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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,
Petitioners,

v.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ; JAIME P. GUTIERREZ; AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

Brief Of Amici Curiae American Civil Liberties Union, American Civil Liberties Union Of Northern California, Arizona Civil Liberties Union, American Jewish Congress, Anti-Defamation League, National Education Association, And People For The American Way, In Support Of Respondents

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INTEREST OF AMICI

The interests of Amici are set forth in the Appendix accompanying this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

In 1988, by the slimmest of margins (50.5% to 49.5%), Arizona voters added Article 28 to the Arizona Constitution declaring English the State's "official" language. Unlike "official English" legislation of any other state, Article 28 explicitly and broadly bans the government's use of non-English languages in communicating with limited- and non-English-speaking citizens and residents of Arizona. It requires every level and branch of government and all "government officials and employees during the performance of government business" to "act in English and no other language." §§1.2, 1.3. Article 28 also requires all levels of government "to preserve, protect and enhance the role of . . . English . . . as the official language," and prohibits all state and local entities from enacting or enforcing any "law, order, decree or policy which requires the use of a language other than English." §§1.3(b), 3.1(b).

Article 28 contains exemptions permitting the use of non-English languages only: to protect the rights of criminal defendants and victims, to protect the public health and safety, to teach a "foreign" language and to comply with federal laws. §3.2. These exemptions, which are both limited and vague,[1] leave unprotected a wide range of important and vital governmental functions and services, including consumer, social and voter education projects, vocational rehabilitation services, public education and all manner of civil and administrative proceedings, to identify but a few.

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[1] For instance, Article 28 gives no guidance as to where to draw the line between "public health" and non-"public health." Does it apply to routine vaccinations, individual drug or alcohol rehabilitation, psychological or trauma counselling, development of a toxic waste site? Similarly, is a parolee appearing before a parole board covered by the exception for "criminal defendants"?

This suit challenging Article 28 on First and Fourteenth Amendment grounds was brought by Maria-Kelley Yniguez, a state employee, and Jaime Gutierrez, a state legislator, each of whom routinely used Spanish in serving their public constituents and believed Article 28's ban on the use of non-English languages during the performance of their duties violated their rights and those of other public employees and the public. The District Court dismissed Gutierrez on procedural grounds but issued a declaratory judgment in Yniguez' favor, finding Article 28 overbroad under the First Amendment. 730 F.Supp. 309 (D. Ariz. 1995). The court later awarded Yniguez $1 in nominal damages.

Following the State's decision not to appeal, Petitioners Arizonans for Official English and Robert Park, sponsors of Proposition 106, were permitted to intervene in order to appeal the judgment. Respondent Arizonans Against Constitutional Tampering, the campaign organization that opposed Proposition 106, whose members include State legislators, was permitted to intervene on appeal as a plaintiff.

The Ninth Circuit affirmed, 69 F.3d 920 (9th Cir. 1995) (*en banc*), ruling that Article 28 violated the First Amendment rights of public employees and elected officials. It found that the government's communications in non-English languages were matters of public concern, particularly given the substantial impact of Article 28 on the public's right to receive government information, and that the interests in permitting such communication outweighed any asserted interest in prohibiting it.

SUMMARY OF ARGUMENT

Article 28 of the Arizona Constitution is unlike any other law ever challenged on First Amendment grounds in this Court. It is a sweeping injunction against speech in any language other than English, harming vital First Amendment interests of the public without any record evidence of a compelling, substantial or even rational justification.

On its face, Article 28 explicitly suppresses a vast body of *pure speech*. Its sweep affects virtually *every* transaction

between non-English speakers and every branch of state and local government in Arizona. Its injunction against speech is indiscriminate and *ex ante*: it effectively precludes non-English speaking Arizonans, whatever their circumstances and needs, from communicating and interacting with their governments, including state and local legislators and their aides, even if the public employees and officials are willing and able to use non-English languages. It attempts to coerce compliance with a linguistic orthodoxy in a manner which actually undermines, rather than promotes, national unity. The extraordinary nature of this law -- whose proscriptions are so remarkably broad and sweeping as to defy the usual First Amendment categories of content and viewpoint neutrality -- warrants strict judicial scrutiny.

Petitioners contend that Article 28 should not be subject to any meaningful scrutiny, because it merely governs the State's speech in "internal operations" over which the government has virtually complete control. However, limiting this case to government control over *its* speech, internal or otherwise, ignores the most important participants in this First Amendment equation: the non-English speaking members of the public, *joint stakeholders* in the communications banned by Article 28, who will no longer be able to *communicate and interact with* the government on an almost limitless range of subjects.[2] Article 28, therefore, strikes at the core of participatory democracy and undermines a fundamental value of the First

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[2] For example, under Article 28, non-English speakers will no longer be able to participate in discussions with their elected representatives or those representatives' aides, who may be ready and able to communicate in their constituents' language. A non-English speaking citizen will be prevented from exchanging information with a government investigator about a fair housing, employment discrimination, environmental or wage violation claim. A non-English speaking parent will no longer be able to converse with a teacher about her child's progress in school or special needs. An unemployment or disability insurance claimant will not be able to converse with a claims representative about the fairness of a decision to terminate benefits.

Amendment -- the facilitation of self-governance essential to a democratically organized society.

These burdens, moreover, are selectively and discriminatorily imposed, purposefully falling on a discrete and historically disadvantaged segment of the public -- comprised almost exclusively of ethnic minorities and immigrants -- who are thereby excluded from virtually *all* communications with government *regardless* of their importance to the individual.

This case, therefore, is not controlled by the Court's public employee or government speech cases. *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny have all concerned the protection afforded to speech initiated by a particular employee (such as a presentation to the board of education, a complaint to co-workers about working conditions, or writings or speeches to the public). In contrast, Article 28's ban interferes with *interactive communications* between citizens and their government, and thus directly infringes the First Amendment rights of the public as well as those of public employees or officials. Moreover, unlike *Pickering*, the State does not assert any employment-related justification for Article 28.

Nor does Article 28 embody the government's interest in communicating a particularized message or viewpoint such as the advisability of abortion (*Rust v. Sullivan*, 500 U.S. 173 (1991)) or the political nature of particular films (*Meese v. Keene*, 481 U.S. 465 (1987)). Rather, it bars an entire medium of speech *irrespective* of its substantive content or message.

Furthermore, even assuming the government may under certain circumstances restrict public employees from using non-English languages in the course of their duties, Article 28's indiscriminate reach is fatally overbroad. It bars non-English communications not only by Maria-Kelley Yniguez, but also by elected officials communicating with their constituencies, by judges performing marriage ceremonies, and by public teachers, academics, and librarians in and out of the classroom.

Accordingly, the Court's consideration of the constitu-

tionality of Article 28 cannot be constrained by the mechanical application of public employee speech cases nor by the general proposition that the government has significant control over the content of its own speech. Rather, Article 28 must be examined in light of, and subject to searching scrutiny consistent with, the multiple First Amendment interests directly and substantially affected by its sweeping ban. Under this standard -- indeed, even under a less rigorous standard of review -- the asserted justifications for Article 28 are unpersuasive.

Although Petitioners assert that Article 28 will make the government more efficient, the State of Arizona has stipulated that its administrative efficiency and operational effectiveness is *enhanced*, not impeded, by its employees' ability to use non-English languages in the course of their duties. Indeed, independent of the State's stipulation, Article 28 *undermines* the asserted governmental interest in ensuring that its communications are "neither garbled nor distorted," *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. ___, 115 S.Ct. 2510, 2518 (1995), precisely by requiring the State to communicate in a language incomprehensible to non-English speakers.

The general social goals Petitioners advance also fail to withstand scrutiny. Article 28 is not needed to protect English as the State's primary language: English is already spoken by 96% of Arizonans, and English acquisition remains a high priority among immigrants. Nor is Article 28 narrowly, or even reasonably, tailored to enhance English proficiency: it indiscriminately penalizes all non-English speakers by preventing them from interacting and communicating with government *regardless* of their circumstances or needs. Most importantly, Article 28 does not foster by "persuasion and example" the goal of national unity. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 640-42 (1943). Rather, Article 28 is an unconstitutionally coercive measure which categorically disenfranchises a discrete, disadvantaged and vulnerable segment of the population. Ultimately, its imposition of a rigid linguistic orthodoxy not only suppresses constitutionally protected communication in non-"official" languages, but it is divisive and

counterproductive to social cohesion as well.

ARGUMENT

I. ARTICLE 28'S SWEEPING, INDISCRIMINATE BAR EXPLICITLY AND PURPOSEFULLY SUPPRESSES PURE SPEECH.

Article 28 prohibits all public officials and employees in Arizona from acting (except for limited and ill-defined circumstances exempted in §3.2) in a language other than English while carrying out governmental functions and policies. In purpose and effect, it prevents all officials and employees from communicating with thousands of limited-proficient and non-English-speaking Arizonans even when they have the means, ability and desire to communicate in a language their public understands. Meaningful communication is barred regardless of need or public value. As the Court of Appeals noted, Article 28 "could hardly be more inclusive"; it "prohibit[s] the use in all oral and written communications by persons connected with the government of all words and phrases in any language other than English." *Yniguez*, 69 F.3d at 933.

Article 28 thus contravenes core principles and values undergirding the First Amendment. First, it *directly bans pure speech on its face*. It thus poses a more immediate threat to First Amendment values than legislation which regulates conduct and only incidentally impinges upon speech. *Cf. United States v. O'Brien*, 391 U.S. 367, 375, 382 (1968); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Laws "directed at speech" and communication are subject to "exacting scrutiny" and must be "justified by the substantial showing of need that the First Amendment requires." *Texas v. Johnson*, 491 U.S. 397, 406 (1989); *First National Bank v. Bellotti*, 435 U.S. 765, 786 (1978) ("*Bellotti*"); *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976).

Second, by requiring the government to use a language that is incomprehensible to the non-English speaking members of its public, Article 28 effectively bars communications *in toto*. The purpose of speech is to make oneself understood; imparting

a comprehensible message is the essence of communication.[3] Article 28 does not merely regulate a mode of expression[4] but bans communication completely. Therefore, it cannot be characterized as a mere time, place or manner restriction. Indeed, as this Court has only this Term observed:

> [C]omplete speech bans, unlike content-neutral restrictions on the time, place, or manner of expression, are particularly dangerous because they all but foreclose alternative means of disseminating certain information.

44 Liquormart, Inc. v. Rhode Island, ___ U.S. ___, 116 S.Ct. 1495, 1507 (1996) (internal citation omitted); *see also City of Ladue v. Gilleo*, ___ U.S. ___, 114 S.Ct. 2038, 2045 (1994) ("Our prior decisions have voiced particular concern with laws

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[3] *See Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers") (Brennan, J., concurring).

[4] For example, if the State banned foreign language newspapers from printing in any language other than English, or conversely required that only one language (*e.g.*, Russian) be used, it could hardly maintain that it was merely regulating a "mode" of expression. *Cf. Meyer v. Nebraska*, 262 U.S. 390 (1923) (law restricting teaching of German in public and private schools unconstitutional); *Asian American Business Group v. Pomona*, 716 F. Supp. 1328 (C.D. Cal. 1989) (limiting use of non-English languages on private business signs violates First Amendment). The same would be true if the State required all public doctors to communicate with their patients solely in Latin, or required all government communications to be written, not oral, thereby excluding illiterate citizens from government services and functions. The point here is not to suggest that the government cannot impose any restrictions on its employees' speech, but simply that a law banning non-English languages has a profound impact on communication.

that foreclose an entire medium of expression").[5]

Third, Article 28 is so sweeping that it defies traditional First Amendment distinctions concerning content and viewpoint neutrality. However it may be characterized, Article 28's ban on speech affects virtually every communicative contact between thousands of limited- and non-English-speaking residents and every governmental entity in Arizona. Even a content and viewpoint neutral ban violates the First Amendment if it broadly impinges upon protected speech. *See United States v. National Treasury Employees Union*, ___ U.S. ___, 115 S.Ct. 1003, 1015 (1995) ("*NTEU*") (striking down content-neutral provisions of Ethics Reform Act because of significant burdens on public employee speech and on "the public's right to read and hear what Government employees would otherwise have written and said"); *City of Ladue*, 114 S.Ct. at 2045 (even content and viewpoint neutral laws "can suppress too much speech"); *Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987) (viewpoint neutral regulation unconstitutional because it

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[5] By definition, time, place, and manner restrictions presuppose the availability of alternative means of communication, such as the distribution rather than posting of leaflets on public property, *Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), or the performance of a concert at a lower than desired volume, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). If the speaker is barred from using the only language comprehensible to the listener, no such alternatives exist. Here, the fact that the speaker is a government official or employee only underscores the absence of meaningful alternatives: not only is government often the sole *source* of information, but it often is the sole intended *object* of the communication.

To require non-English speakers to enlist the aid of private translators is not a meaningful "alternative." Translators may not be available to all members of the public (indeed, might be least available to those people who would need them most), and at best provide an inefficient and expensive means of communication. Such an alternative is not "ample." *Cf. City of Ladue*, 114 S.Ct. at 1025 (alternative not as cheap and convenient and may not be a "practical substitute"); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977) (alternatives "involve more cost and less autonomy").

"prohibited *all* protected expression") (emphasis in original). *See* Stone, "Content-Neutral Restrictions," 54 U. Chi. L.Rev. 46, 53-54 (1987) (content-neutral laws may nonetheless be subject to heightened scrutiny).[6]

Finally, like the law struck down in *NTEU*, Article 28's ban on speech is *ex ante*. Rather than providing the basis for a *post hoc* punishment of a public employee's speech, it is a "wholesale deterrent to a broad category of expression by a massive number of potential speakers" and thus "chills potential speech before it happens." *NTEU*, 115 S.Ct. at 1013-1014.[7]

II. ARTICLE 28 INFRINGES UPON THE FIRST AMENDMENT RIGHTS OF LIMITED AND NON-ENGLISH-SPEAKING ARIZONANS TO PETITION FOR REDRESS OF GRIEVANCES AND TO COMMUNICATE WITH AND RECEIVE INFORMATION FROM THEIR GOVERNMENT.

"The Constitution often protects interests broader than those of the party seeking their vindication. The First Amend-

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[6] A strong case can be made, moreover, that Article 28's ban on speech is not content neutral in fact because its application turns literally upon the content of speech -- the words used. The government's regulation of the speaker's chosen words, even to convey a message that could be similarly expressed in other words, cannot be characterized as content neutral. *Cohen v. California*, 403 U.S. 15, 24 (1971) (generally "governmental bodies may not prescribe the form or content of . . . individual expression"); *Spence v. Washington*, 418 U.S. 405, 411 n. 4 (1974) (statute limiting expression violates First Amendment even if views could have been expressed in other ways). If proscribing particular words is content regulation, so perforce is a ban on entire vocabularies.

[7] The chilling effect of Article 28's broad, *ex ante* prohibitions is reinforced by the vagueness of its exceptions. Not only do these exceptions fail to give public employees guidance as to their application, *see* n. 1, *supra*, but Article 28 impels public employees to apply them narrowly since they may be disciplined or even sued, *see* §4, for violating its prohibitions. *Cf. Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *NAACP v. Button*, 371 U.S. 415, 433 (1963).

ment, in particular, serves significant societal interests." *Bellotti*, 435 U.S. at 776. Restrictions placed upon expression by the speaker may implicate distinct and different rights of the listener. *NTEU*, 115 S.Ct. at 1015 ("large-scale disincentive to government employees' expression also imposes a significant burden on the public's right to read and hear"); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976).

While Article 28 is ostensibly directed at the speech of public employees and officials, it necessarily and substantially impairs the First Amendment rights of limited- and non-English-speaking residents of Arizona.[8] Article 28 extends well beyond so-called official "government speech" to affect virtually every interaction between government and the language-minority public, depriving thousands of non-English proficient citizens and residents of the opportunity not only to receive information from, but to communicate with (i.e., to be heard and responded to by) their government, and thus of their right to petition the government for redress of grievances. In this way, Article 28 not only offends fundamental First Amendment values essential to the functioning of our democratic republic, *see, e.g.*, *Bellotti*, 435 U.S. at 776-777; *Thomas v. Collins*, 323 U.S. 516, 529-32 (1945), but it also discriminatorily allocates its burdens by impairing the ability of discretely identifiable and historically disadvantaged groups to participate in their government.[9]

The right to petition for redress of grievances is a fundamental First Amendment right lying at the core of our democra-

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[8] According to the 1990 Census, 122,423 (4%) Arizonans over the age of 5 do not speak English well, while 275,907 (8%) do not speak English "very well." Bureau of the Census, *1990 Census of Population, Social and Economic Characteristics, Arizona*, 48 (1990). Included among limited and non-English speakers are elderly citizens and Native Americans. *See* 8 U.S.C. §1423(b)(2) (elderly long-time residents may be excused from English language requirement for naturalization).

[9] These claims are properly presented by the record in this case. *See* n. 21, *infra*.

cy. *McDonald v. Smith*, 472 U.S. 479, 482-83, 485 (1985); *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217, 222 (1967) (right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights"); *U.S. v. Cruikshank*, 92 U.S. (2 Otto) 542, 552 (1876) (The right of the people to assemble and to petition their government for a redress of grievances is inherent in the concept of a republican form of government).[10] The right broadly protects "[g]reat secular causes[] with small ones" -- causes that are "not confined to any field of human interest," *Thomas v. Collins*, 323 U.S. at 531 -- and bars State interference with access to the legislature, the executive branch and its various agencies, and the judicial branch.[11]

Under Article 28, executive and administrative officials and employees, as well as legislative representatives and their staffs, are all barred from communicating with their constituents in Spanish or any language other than English. Because of its unprecedented scope, Article 28 interferes with everyday activities and communications most citizens take for granted, burdening the non-English speaking resident who seeks to take issue with his utility charges, to address his city council or school board, or to contest an eviction from public housing. By erecting a permanent linguistic barrier between non-English speakers and every branch and agency of their government on an almost limitless variety of subjects, Article 28 thus unques-

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[10] *See also Eastern R. Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961) ("the whole concept of representation depends on the ability of the people to make their wishes known to their representatives"); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575 (1980) (First Amendment freedoms, including the right to petition for redress of grievances "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government").

[11] *See Noerr*, 365 U.S. at 137-38 (legislature); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (executive); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (administrative agencies); *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. at 221 (courts).

tionably infringes the non-English speaking public's right to petition.

Furthermore, by categorically prohibiting public employees and officials from communicating in a non-English language (or even using non-English words), Article 28 effectively bars language minorities from receiving important, often vital, governmental information. Under Article 28, government employees are no longer able to convey in Spanish, Navajo, or Vietnamese information about a proposed redevelopment project, a water conservation program, consumer fraud, job training opportunities, wage and hour laws, changes in hunting and fishing regulations, the contemplated closure of a local school, or countless other subjects. Article 28 thus impairs the public's right "to receive information and ideas." *Virginia State Board of Pharmacy*, 425 U.S. at 757, quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972).

Access to government information is particularly important for the proper functioning of a democracy. "Governments have an almost unique capacity to acquire and disseminate information in the modern state." Yudof, *When Government Speaks*, 9-10 (1983); *see also* Meiklejohn, *Free Speech and its Relation to Self-Government* 65-66 (1948) (First Amendment protects right of people to intelligently discuss issues of public concern for purpose of self-government). Accordingly, the principle that "the right to receive ideas is a necessary predicate to the recipients' meaningful exercise of his own rights of speech, press, and political freedom," *Board of Ed. v. Pico*, 457 U.S. 853, 867 (1982), applies with particular force to government information. Certainly, the First Amendment interest in obtaining government information essential to the functioning of a democratic republic is at least as great as that in obtaining commercial information from private advertisers. *See Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64-65 (1983) (commercial speech enjoys less protection than core First Amendment speech); *see also 44 Liquormart*, 116 S.Ct. at 1507-1508.

Finally, by barring public officials and employees from

communicating with members of the public in any non-"official" language, Article 28 effectively prevents *interactive* communications between the government and the non-English speaking public. Public employees can neither initiate communication with nor even receive or reply to inquiries in the languages understood by non-English-speakers. Article 28 bans everything from a town hall discussion with elected officials to a private dialogue between a parent and teacher. Without the possibility of conversation or dialogue, the essential nature of *communication* is thwarted.

Of course, *amici* do not claim that every denial of access to government or governmental information violates the Constitution. This case, however, does not challenge a failure to provide a particular service or notice in a non-English language. Rather, Article 28 was intended to *eliminate* multilingual governmental functions and services -- even those that promote government efficiency and equity and that government officials would otherwise voluntarily provide. Petitioners' reliance on cases rejecting constitutional claims that the government has a duty to provide a non-English language notice, examination, or service is therefore misplaced.[12] None of them involved an explicit and purposeful *suppression* of speech as sweeping as that presented here; indeed, none involved a First Amendment challenge at all. Although the plaintiffs in those cases asserted an affirmative right to bilingual services, this case involves a negative liberty -- the right not to have the government bar communications between willing speakers and listeners. *Cf. Maher v. Roe*, 432 U.S. 464, 475-77 (1977); *DeShaney v. Winnebago Dept. of Soc. Services*, 489 U.S. 189, 195 (1989). Nor did these cases involve the deliberate imposi-

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[12] *See Soberal-Perez v. Heckler*, 717 F.2d 36 (2nd Cir. 1983), *cert. den.*, 466 U.S. 929 (1984) (provision of governmental notices in English); *Toure v. U.S.*, 24 F.3d 444 (2nd Cir. 1994) (per curiam) (no governmental notices in French); *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973) (provision of forms and services in English only); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975) (civil service exam provided only in English).

tion of burdens on language minorities; rather, the omissions or failures to provide bilingual services were the incidental result of neutral policies and practices, such as the reasonable allocation of limited resources. Article 28, in contrast, was enacted "'*because of*,' and not 'in spite of'," the burden it imposed on language minorities.[13] *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977). Finally, Article 28's blanket ban on the use of all non-English languages in all levels and branches of government -- coupled with its deliberate withdrawal of bilingual services -- is a sweeping and pervasive infringement of constitutional guarantees that far exceeds the particularized failure of a single governmental agency to provide bilingual services or notices. *Cf. Pico*, 457 U.S. at 879 n.1 ("removal, more than failure to acquire, is likely to suggest an impermissible political motivation may be present") (Blackmun, J., concurring) (citation omitted).

III. ARTICLE 28 DISCRIMINATES IN THE ALLOCATION OF FIRST AMENDMENT RIGHTS.

Article 28's unconstitutional ban on pure speech also offends core First Amendment precepts by imposing unequal barriers to communication with the government and by selectively disenfranchising language minority groups. Embedded within the First Amendment is "the principle of equal liberty of expression." Karst, "Equality as a Central Principle in the First Amendment," 43 U. Chi. L. Rev. 20, 23 (1975); *see, e.g., Carey v. Brown*, 447 U.S. 455 (1980); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("we have frequently condemned such discrimination among different users of the

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[13] Article 28's rationale, according to its proponents, was to withdraw available services and thereby make life difficult for non-English speakers so as to "encourage the learning of English." Pet. Br. at 17. *See* Arizona Publicity Pamphlet at 27 (argument submitted by Petitioner Robert D. Park (also chair of Petitioner Arizonans for Official English) ("passage of Proposition 106 would *encourage* non-English speakers to familiarize themselves with the language") J.A. 29 (emphasis added).

same medium for expression"). *See also Grosjean v. American Press Co.*, 297 U.S. 233 (1936), *Minneapolis Star & Tribune v. Minnesota Comm. of Revenue*, 460 U.S. 575 (1983), and *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987) (selective taxation targeting small, discrete segments of the press violative of First Amendment). *Cf. Broadrick v. Oklahoma*, 413 U.S. 601, 616 (1973) (upholding a law restricting the political activities of state employees, finding it "is not a censorial statute, directed at *particular groups* or viewpoints") (emphasis added).[14]

Here, Article 28 egregiously violates the First Amendment equality principle by discriminatorily barring a small (relative to the general population), discrete, and already vulnerable group from the important arena of governmental communications. Article 28 is plainly "directed at particular groups," *Broadrick*, 413 U.S. at 616 -- groups that are at least as vulnerable and disfavored as the newspapers and magazines selectively taxed in *Grosjean*, *Minneapolis Star*, and *Arkansas Writers' Project*.[15] *Cf. Buckley*, 424 U.S. at 48-49 (govern-

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[14] *See also Rosenberger*, 132 L.Ed.2d at 714-15 ("In the realm of private speech or expression, government regulation may not favor one speaker over another"); *Bellotti*, 435 U.S. at 784-85 ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue"); *Buckley*, 424 U.S. at 18 (campaign expenditure restrictions that "discriminate among speakers" unconstitutional).

[15] At various times in American history, language minorities have been victimized by language barriers purposefully erected against them. *See* Leibowicz, "The Proposed English Language Amendment: Shield or Sword?" 3 Yale Law & Policy Rev. 519, 533-39 (1985) (English literacy requirements were erected as conditions for public employment, naturalization, immigration, and suffrage in order to exclude "new" immigrants from Italy, Russia, Hungary and other southern and eastern European countries); *id.* at 536 (New York Constitution was amended to disenfranchise over one million Yiddish-speaking citizens); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (schools prohibited from teaching German); *Castro v.*

(continued...)

ment may not "restrict the speech of some elements of our society in order to enhance the relative voice of others"; First Amendment "designed 'to secure "the widest possible dissemination of information from diverse and antagonistic sources"'").

To be sure, the differential treatment condemned in prior cases, which involved only indirect and incidental burdens on speech,[16] was animated primarily by concern over viewpoint suppression by the State. However, this Court has never before countenanced the direct and purposefully discriminatory infringement upon the First Amendment rights of a discrete and disfavored group -- consisting almost exclusively of immigrants and ethnic minorities -- whose lack of English proficiency already disadvantages them in the arena of public discourse and governmental communication. Nor should it do so here. Official suppression of viewpoints is not the sole concern of the First Amendment. *See City of Ladue*, 114 S.Ct. at 2045; *Jews for Jesus*, 482 U.S. at 574-576; *Minneapolis Star*, 460 U.S. at

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[15] (...continued)
California, 2 Cal.3d 223 (1970) (California Constitution amended to disenfranchise Chinese-speaking voters); Reyhner, "Policies Toward American Indian Languages: A Historical Sketch," *Language Loyalties*, 41-47 (1992) (J. Crawford, ed.) (Native American children separated from their families and forced to attend English language boarding schools where they were punished for speaking native language). Congress has recognized the continuing depth of discrimination against language minorities. *See* 42 U.S.C. §1973b(f)(1). *See also Hernandez v. New York*, 500 U.S. 352, 371 (1991) ("It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis").

[16] *See Leathers v. Medlock*, 499 U.S. 439, 452-453 (1991) (extension of generally applicable sales tax to cable television services but not to print media); *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) (contributions to non-profit organizations engaged in lobbying not deductible except for veterans organizations); *Mabee v. White Plains Publ. Co.*, 327 U.S. 178 (1946) (exempting certain small newspapers from general application of Fair Labor Standards Act to newspapers and other businesses).

592. A statute challenged under the First Amendment "must be tested by its operation and effect." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 708 (1931); *see also*, *NAACP v. Richmond*, 743 F.2d 1345, 1356 (9th Cir. 1984). The systematic deprivation of an identifiable group's right to communicate with government undermines one of the First Amendment's central values and functions: to "secur[e] and foster[]" the integrity of "our republican system of self-government." *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring).[17] It threatens to distort the marketplace of ideas. *See* Stone, 54 U. Chi. L.Rev. at 55.

In addition to suppressing the fundamental right of language minorities to communicate with their government, Article 28 also imposes a structural obstacle to their participation in the political process by flatly prohibiting any public entity, including state and local legislatures, from "mak[ing] or enforc[ing] a law, order, decree or policy which requires the use of a language other than English." Art. 28, §3.1. Like the initiative measure struck down in *Romer v. Evans*, ___ U.S. ___, 116 S.Ct. 1620 (1996), Article 28 precludes language minorities from seeking beneficial legislation (*e.g.*, establishing multilingual services) through the normal political process. Unlike any other group (such as women, the disabled, veterans, or the elderly), language minorities may obtain beneficial legislation "only by enlisting the citizenry of [Arizona] to amend the state constitution . . . . This is so no matter how local or discrete the harm, no matter how public and widespread the injury." 116 S.Ct. at 1627. As in *Romer*, Article 28 thus imposes "a broad and undifferentiated disability on a single named group" and "identifies persons by a single trait," *id.* at 1628, in denying them the right to equal participation in the process of government. *See also*, *Hunter v. Erickson*, 393 U.S.

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[17] The discriminatory imposition of burdens may violate the First Amendment even when the government has no improper censorial motive. *Minneapolis Star*, 460 U.S. at 592 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment"). The *risk* of suppression, regardless of motive, is sufficient. *Leathers*, 499 U.S. at 453.

385, 391 (1969); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 483-84 (1982).

IV. THIS CASE DOES NOT CONCERN THE STATE'S CONTROL OVER ITS "INTERNAL OPERATIONS-" AND GOVERNMENTAL SPEECH.

Despite Article 28's infringement upon core First Amendment interests, Petitioners claim that Article 28 should not be subject to any significant judicial scrutiny because the state has virtually complete power over its own speech. The argument is meritless, and neither *Rosenberger*, 115 S.Ct. 2510, nor *Rust*, 500 U.S. 173, upon which Petitioners rely, are apposite, let alone controlling.

The concept of "government speech," as explained in *Rust* and *Rosenberger*, basically encompasses the government's ability to promote and expound its views and policies -- usually through policy choices made by specific agencies, or by the legislature and implemented by the executive branch -- without being obliged to offer "equal time" to other views. *Rust* gives a paradigm example: "[w]hen Congress established a National Endowment for Democracy . . ., it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." 500 U.S. at 194; *see also Meese*, 481 U.S. 465 (government may express its views about whether certain films are "political propaganda").

Nonetheless, although the State as speaker "may make content-based choices" and "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted," *Rosenberger*, 115 S.Ct. at 2518, the State may not use its expression to threaten or coerce and thus interfere with the civil liberties of citizens, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *see also Block v. Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986) (Scalia, J.) ("The line of permissibility, we think falls . . . between the disparagement of ideas . . . and the suppression of ideas through the exercise or threat of state power").

Article 28 reflects no "government speech" interest: it neither embodies any government interest in conveying a substantive message or viewpoint nor ensures that any substantive government message is not garbled or distorted. In fact, as Arizona has acknowledged, Article 28 actually *undermines* its interest in ensuring its messages are clearly understood. As its proponents intended, its prohibitions ensure that thousands of limited and non-English-speaking Arizona residents will get either a garbled message or no message at all. *See Amicus* Brief of National Council of La Raza, *et al.* (describing impact of Article 28 on government communications with language minorities).

Article 28 also does not negate the State's ability to make a content-based choice to communicate a substantive message. With or without Article 28, the State can express or withhold its views on abortions, films, books, welfare, immigration policy or any other matter within its legitimate sphere. It can advise the public about the importance of a common language and the benefits to all its residents of learning English. Article 28's ban on the use of non-English languages, however, has nothing to do with such content-based choices on speech because its coercive prohibitions ban virtually all non-English communication *regardless* of its substantive content.[18]

Nor does Article 28 merely regulate the "internal operations" of government, as Petitioners contend. Rather, Article 28 extends well beyond the confines of official "government

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[18] To the extent Petitioners maintain that the State is delivering a symbolic message about national and social unity in banning all non-English languages from governmental discourse, Article 28 is not merely advisory. Rather, it *coerces* the public's expression of and participation in a particular substantive message at the expense of the public's own constitutionally protected speech rights. The coercion of such orthodoxy in a misguided attempt to foster national or social unity violates the same basic First Amendment rights vindicated in *Barnette*, 319 U.S. at 640-42 ("no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith" in a prescribed orthodoxy).

speech" to affect virtually every interaction between the government and a substantial segment of the public. It imposes a strict ban on the speech of multifarious state and local officers and employees, including judges and legislators, who have many different substantive messages to convey; and it also suppresses communication by, and receipt of information from, the non-English speaking public.

Moreover, the Court has never extended the "government speech" theory to a law affecting governmental communications as vast and various as those encompassed by Article 28. In contrast to the situation in which a particular executive agency seeks to convey its own particular message (*e.g.*, *Rust*), an assertion of a "government speech" interest in such a broad range of communications by every level and branch of the government as a whole is highly suspect because there is: (1) less likelihood of a coherent, particularized message;[19] (2) an increased risk of large-scale infringement upon the free speech rights of public employees, other agencies of government, and the public; and (3) a greater risk of a "pall of orthodoxy" than where a single agency is involved. *Cf. Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

Thus, neither *Rust* nor *Rosenberger* controls this case.[20]

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[19] Government "speaks" with many voices: legislative and judicial branch employees, for example, may, and often do, vociferously disagree. Even within the executive branch different agencies may have different messages to convey (e.g., occupational safety vs. corporate promotion, or civil rights enforcement vs. defense of government officers who are sued for civil rights violations). Local and county offices often have different messages than statewide agencies.

[20] *Rust*, which upheld a prohibition on spending federal subsidies under Title X for abortion counseling, is inapposite for additional reasons. First, the challenged restrictions applied only to the grantee's project activities receiving Title X monies; the grantee was left "unfettered in its other activities." 500 U.S. at 196. Clinics could continue to provide, and patients could continue to receive, abortion counseling so long as Title X monies were segregated from that activity. In contrast, Article 28's bar (continued...)

The primary thrust of Article 28 is not to convey a substantive message but to suppress virtually all communications between non-English proficient Arizonans and their government, to deprive legislators and other government officials of their constitutional rights to communicate with the public, and to garble, rather than enhance, whatever messages the government may legitimately desire to express.

V. ARTICLE 28 IS SUBSTANTIALLY OVERBROAD.

A law is unconstitutionally overbroad if it burdens a substantial amount of protected speech and thus presents "'a realistic danger'" that it will "'significantly compromise recognized First Amendment protections of parties not before the Court . . . .'" *Jews for Jesus*, 482 U.S. at 574, quoting *Taxpayers for Vincent*, 466 U.S. at 801. Facial challenges based on overbreadth are permitted because of the severe "chilling effect" overbroad laws have on protected speech. *Jews for Jesus*, 482 U.S. at 574-76. Thus, because it poses on its

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[20] (...continued)
is near absolute, and, as in *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), distinguished in *Rust*, no alternative means exist by which non-English-speakers can communicate with the government to obtain information which, unlike abortion counseling, often is not available elsewhere.

Nor did *Rust* involve a "general law singling out a disfavored group on the basis of speech content." 500 U.S. at 194. As demonstrated above, Article 28 does single out an historically disfavored, vulnerable group and, with only limited and vague exceptions, effectively bars all their communication with government.

Finally, *Rust* is predicated on the recognized distinction between "state interference with protected activity" and "state encouragement of alternative activity." 500 U.S. at 193, quoting *Maher*, 432 U.S. at 475. Article 28 clearly crosses that line into illegitimate "interference" with basic First Amendment freedoms. The citizenry's right to communicate with and receive information from their government, and to petition for redress of grievances, is historically rooted in our constitutional democracy and long recognized as essential to the proper functioning of a republican form of government. *See* Section II, *supra*.

face too great a risk of censorship, a statute may be impermissibly overbroad even assuming it has some constitutional applications. *Vincent*, 466 U.S. at 798-800.[21]

Judged by these standards, Article 28 is plainly overbroad.[22] Even assuming the State may require its employees to use only English in certain contexts (such as in communicating with monolingual English speakers, in performing a joint task with other employees who speak only English, or in preparing documents which must be reviewed by English-speaking supervisors), Article 28, if upheld, would regularly and unavoidably suppress a wide range of core First Amendment speech.

First, as demonstrated above, Article 28 does not just burden, it outright *bans*, speech: it does so not just on a single subject but on a vast range of subjects on which the limited- and non-English-speaking public may need to communicate with government. It imposes a large-scale infringement upon the rights of the public to receive information, to communicate with the government, and to petition for redress of grievances.

Second, Article 28 censors a huge category of communi-

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[21] As in any overbreadth case, the plaintiff may properly assert the First Amendment interests of all those potentially affected by the challenged law: here, other public employees, elected officials, and members of the public whose rights to receive information, communicate with government, and participate in the political process are infringed. *See, e.g., Vincent*, 466 U.S. at 798; *Broadrick*, 413 U.S. at 612; *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940). In addition, Respondent Arizonans Against Constitutional Tampering (AACT) represents the interests of the public as well as legislators and executive branch employees. *See* AACT Brief in Opposition at 2; Arizona Publication Pamphlet at 32 (argument submitted by State Representative Armando Ruiz, chairman of AACT) J.A. 39-40.

[22] Although the "substantial" overbreadth requirement does not have a particular quantitative threshold, the requisite degree of "substantiality" diminishes where, as here, pure speech rather than expressive conduct is regulated. *Broadrick*, 413 U.S. at 612-13.

cations between and among elected officials in all branches and at all levels of government, their entire staffs, and their constituents. These communications, to which the concept of "government speech" simply does not apply, deserve the First Amendment's greatest protection. *Bond v. Floyd*, 385 U.S. 116, 135-37 (1966). In this respect alone, Article 28 is substantially overbroad because, in suppressing speech by elected officials and their staffs, it thereby thwarts vital communication throughout the government. *See Yniguez*, 69 F.3d at 950 (Brunetti, J., concurring). *See Amicus* Brief of the Congressional Asian Pacific American Caucus and the Congressional Hispanic Caucus (elaborating on this point).

Finally, however the individual plaintiffs' free speech rights may be categorized, Article 28's wholesale bar goes much farther to affect virtually every contact or conversation any public employee may have with non-English-speaking members of the public and to prevent speech between willing speakers and listeners in a nearly infinite variety of circumstances. As the Ninth Circuit's decision demonstrates, even viewed within *Pickering*'s less rigorous First Amendment framework, there are many instances where employee speech is a matter of public concern and the interest in permitting that speech outweighs the State's interest in prohibiting it. *Yniguez*, 69 F.3d at 938-42.[23]

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[23] Contrary to U.S. English's suggestion, Article 28 cannot be "narrowly construed" to eliminate its substantial overbreadth. No readily identifiable unconstitutional term can be excised. *See Brockett v. Spokane Arcades*, 472 U.S. 491 (1985). Nor do the exceptions in §3.2 significantly limit Article 28's sweep. Indeed, they are so vague that they offer no assurance of a sufficiently narrowing interpretation and, indeed, create additional constitutional problems by vesting unbridled discretion in those charged with their enforcement. *See, e.g., Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 133-36 (1992); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976). As this Court has made clear, federal courts cannot rewrite state laws; only when a provision is "'*readily susceptible*' to a narrowing construction" can a court interpret it to avoid constitutional invalidation. *Virginia v. American Booksellers Association*, 484 U.S. 383, 397 (1988) (emphasis added). Article 28

(continued...)

In an attempt to negate such overbreadth, Petitioners advocate for a categorical rule that public employees have virtually no First Amendment rights with respect to speech in the course of government business. Under that theory, a state employee's discussion of conditions at public hospitals, a whistleblower's report critical of high officials, an administrative judge's finding of government wrongdoing, a teacher's exercise of academic judgment in the classroom, or a public defender's representation of a client would have no meaningful First Amendment protection against the State's interference simply because the speech is performed in the course of governmental business.[24] Such a rule asks too much.

On its face, Article 28 prohibits even a single word or phrase in Spanish or any other foreign language by any public official or employee in a vast number of instances irrespective of the circumstances and regardless of the importance of the subject matter. Because its reach extends well beyond whatever core of communications between government and its citizens the State could legitimately require to be made solely in English, Article 28 is hopelessly overbroad.

VI. PETITIONERS' JUSTIFICATIONS FOR ARTICLE 28 DO NOT WITHSTAND CLOSE SCRUTINY.

Article 28's extraordinary, wide-ranging and purposeful ban on pure speech substantially impairs core First Amendment interests of the public, and of public officials and employees, and selectively disenfranchises language minorities from the processes of government. Article 28, therefore, should be subject to strict judicial scrutiny. *See, e.g., NAACP v. Button*, 371 U.S. at 438-39; *Thomas v. Collins*, 323 U.S. at 529-30.

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[23] (...continued)
"simply leave[s] no room for a narrowing construction." *Jews for Jesus*, 482 U.S. at 575.

[24] It would also mean that the government could force all its employees to wear ideological lapel pins or deliver ideological messages irrespective of their normal duties. *Yniguez*, 69 F.3d at 940, n. 24.

Article 28 should not be subject only to rational basis review as "government speech" for the reasons set forth in Section IV, *supra*. Nor should it be analyzed under the less rigorous balancing test of *Pickering* and its progeny, since the State has negated any employment-related justification in stipulating that its employees' use of non-English languages enhances rather than diminishes its efficiency and effectiveness. J.A. 53-54. Moreover, *Pickering* and its progeny have all focused on protection afforded to speech initiated solely by government employees. Article 28, in contrast, directly infringes upon *interactive* communication between the government and its citizenry and thus directly implicates the constitutional rights of the public.[25]

Under any standard of review, Article 28 is unjustified and irrational. None of the four discernable justifications Petitioners have posited in support of Article 28 withstands constitutional scrutiny: none has been shown on this record to be compelling, substantial or even rational; nor has Article 28 been shown to be, nor is it, narrowly tailored to further any of the asserted interests.

A. The State's Interest In Acting In English.

Petitioners contend that the State has an interest in choosing a single language in which to conduct its affairs. Pet. Br. at 27-29. Even assuming that the State has such an interest,

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[25] Thus, by Article 28, Arizona is not regulating its employees' speech in its capacity as employer; it is regulating their speech, as well as that of the public, in its capacity as sovereign. *Waters v. Churchill*, ___ U.S. ___, 114 S.Ct. 1878, 1886 (1994). *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 70 n.4 (1990) (where restrictions on employee speech are not "employment-related," there is no reason to relax strict scrutiny ordinarily applicable); *44 Liquormart*, 116 S.Ct. at 1508 (where ban on advertising serves an end unrelated to consumer protection, it must be reviewed with "special care" exceeding traditional scope of review afforded to commercial speech). In any event, for the reasons stated by the Ninth Circuit, Article 28 fails even the *Pickering* test.

that interest does not justify a *prohibition* of governmental provision of *supplementary* communications in other languages where necessary and appropriate.

B. The State's Interests in Efficiency and Effectiveness.

Petitioners claim that the use of a single language in the performance of all government functions will make government more efficient. As noted above, however, Arizona has stipulated that the State's operational efficiency is *enhanced*, not diminished, by permitting public employees to communicate effectively with non-English-proficient citizens. Nothing in the record demonstrates there has been any administrative problem resulting from the long-standing use of Spanish and other languages by state employees.[26]

Moreover, even if operational problems had been shown, Article 28 is overbroad. There is no showing that a more narrowly tailored measure, such as permitting individual supervisors or departments to impose particularized language restrictions appropriate to the specific circumstances, would be inadequate.

C. The State's Interest In Encouraging Non-English Speakers To Learn English as Society's Common Language.

Assuming the State has a substantial interest in encouraging English proficiency among its residents, Article 28 is an ineffective and inappropriate means of accomplishing that end. First, it is unnecessary. English is already spoken "well" by 96% of the Arizonans over the age of 5. See n. 8, *supra*. Notwithstanding the alarms over "official multilingualism" sounded by Article 28's proponents, the rate of English acquisition among immigrants is as rapid today as ever.[27]

Nor do language minorities need an "incentive" to learn English. In fact, the problem is the lack of English language classes and other such resources available to these groups, not their lack of desire to learn English.[28] Article 28 does nothing constructive to increase the availability of such resources.

Nor is Article 28 tailored narrowly, if at all, to further this asserted interest. It effectively penalizes *all* Arizona residents not proficient in English -- barring them from access to government services, information, and communication -- regardless of their circumstances, abilities or needs. It indiscriminately sweeps within its reach elderly residents who no longer have the capacity to learn a new language, recent immigrants who have not had an opportunity to learn English, and migrant workers who because of limited time and resources cannot enroll in adult English classes. For these individuals and

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[26] Petitioners' assertion that Yniguez wrote releases only in Spanish which her supervisor could not understand misstates the record. *See* Brief in Opposition [to Petition for Certiorari], of Respondent Yniguez, Appendix at 3-5.

[27] Half of all recent Mexican immigrants in California speak English already. Among first-generation Mexican-Americans, 95% are proficient in English; the transformation is even more dramatic for second-generation Mexican-Americans, with at least 50% having lost proficiency in their native tongue. K. McCarthy and R. Valdez, *Current and Future Effects of Mexican Immigration in California* (The Rand Corp. 1985). Other studies show the rate of English acquisition by language minorities is just as rapid as it has been in previous generations. Veltman, *The Future of Spanish Language in the United States* (New York, Wash. D.C.: Hispanic Policy Dev. Project, 1988) at i-x; D. Myers, *The Changing Immigrants of Southern California*, Exh. 4.2, Lusk Center Research Institute, U.S.C. (1995).

[28] In the Miami area, 98% of Latino parents surveyed, as compared to 94% of Anglo parents, felt it was essential for their children to read and write English perfectly. *See The 1985 South Florida Latin Market* (Strategy Research Corp. 1985). Indeed, the demand for English as a Second Language training far outstrips supply nationwide, resulting in long lines and waiting lists for the few available classes. See W. Bliss, "Providing Adult Basic Education Services to Adults with Limited English Proficiency," *Report by Project on Adult Literacy of Southport Institute for Policy Analysis* (1988).

many others, "language might well be an immutable characteristic like skin color, sex or place of birth." *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980), *cert. den.* 449 U.S. 1113 (1981). The burdens Article 28 imposes on these classes clearly do not further its ostensible goals. Indeed, because Article 28 restricts how educators may choose to implement English acquisition programs by prohibiting native language instruction even where proven to be effective (except where mandated by federal law), Article 28 actually *undermines* the asserted goal.

D. The State's Interest In Protecting "National Unity."

Finally, Petitioners argue that the State "has substantial interests in protecting itself and society from the divisive effects of official multilingualism." Pet. Br. at 36. Fatal to Petitioners' position, however, is their failure to present any evidence to support their assertion either that the government's provision of multilingual services threatens societal unity, or that non-English speakers are seeking some form of political separation. When the State suppresses speech to prevent anticipated harms,

> ". . . it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."

NTEU, 115 S.Ct. at 1101.

In fact, there is no language war between English, Spanish and Native-American speakers in Arizona. Not only does our nation's rich history of multilingualism belie the presumption that linguistic diversity inherently threatens our social fabric,[29] but Congress has recently reaffirmed the

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[29] See *Amicus* Brief of the State of New Mexico (describing state's rich history of official bilingualism) and *Amicus* Brief of Congressional (continued...)

"crucial" contribution multilingualism makes to "our nation's economic competitiveness and national security," as well as to our "global perspective" and "understanding of diverse people and cultures." 20 U.S.C. §7512 (Foreign Language Assistance Act of 1994, Pub. L. 103-382 (1994)). This historical tradition, carried forward to the present, refutes Petitioners' alarmist contentions.

Even more fundamentally, for the reasons described in the *Amicus* Brief of the Linguistic Society of America ("LSA"), the suppression of non-"official" languages is actually counterproductive to national unity. Throughout the world, tensions between groups over language have generally been the manifestation, not the cause, of underlying social problems; attempts to suppress one language invariably exacerbate the problem.[30]

Given this tradition, the State's attempt to forge societal unity through coercion is irreconcilable with basic constitutional principles. As this Court observed over a half-century ago:

> National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement. [¶] . . . As governmental pressure toward unity becomes greater, so strife becomes more bitter as to

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[29] (...continued)
Asian Pacific American Caucus, *et al.* (describing the long history of multilingual communication by government since our nation's inception).

[30] See Maldoff, "Comment: a Canadian Perspective," 60 Int'l J. of the Sociology of Language 105, 106 (1986) (conflict between French and English speakers in Canada is the "*result of the withdrawal of, or the failure to recognize, language rights* rather than the result of linguistic tolerance and generosity") (emphasis added); Beardmore and Willemyns, "Comment," 60 Int'l J. of the Sociology of Language 117, 120-121 (1986) (tensions in bilingual nations such as Belgium due not to bilingualism, but rather to historical factors and lack of equality afforded to subordinate language group).

> whose unity it shall be. . . . [¶] . . . [T]he First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.

Barnette, 319 U.S. at 640-41.

Thus, Article 28 has *no* legitimate justifications, and fails to pass muster under *any* standard of review. *See Yniguez*, 69 F.3d at 944-47. As in *Romer*, its "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects." 116 S.Ct. at 1627.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit in this case should be affirmed.

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APPENDIX

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INTEREST OF *AMICI*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members. The American Civil Liberties Union Foundation of Northern California and the Arizona Civil Liberties Union are regional affiliates of the ACLU. The ACLU was founded over seventy-five years ago to preserve and protect the fundamental principles of the Bill of Rights. Central to those principles is the First Amendment's guarantee of freedom of speech, including the right to receive information, to communicate with the government, and petition the government for redress of grievances. The ACLU has also been active in protecting the rights of language minorities from discrimination and infringement upon their speech rights.

The American Jewish Congress ("AJC") is an organization of American Jews founded in 1918 to promote the civil, political, economic and religious rights of American Jews. AJC opposes English-only policies of the sort adopted by Arizona. This position is fueled by history. The American Jewish Congress was founded by Jewish immigrants from Eastern Europe, few of whom arrived speaking any English. Although it is now forgotten, these immigrants were aided by the use of Yiddish by various branches of government to facilitate their contacts with government.

The Anti-Defamation League ("ADL") is one of the nation's oldest civil rights organizations. It was founded in 1913 to combat anti-Semitism and promote good will among all races, ethnic groups, and religions. As set out in its charter, ADL's "ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against any sect or body of citizens." ADL joins in this *amicus curiae* brief because Article 28 of the Arizona Constitution discriminates against non-English speaking minorities, and singles these groups out for disparate treatment in a variety of public contexts in violation of their constitutional rights. It is ADL's belief that when the rights of any group of citizens are jeopardized or impaired the fundamental rights of all citizens are at risk.

The National Education Association (NEA) is a nationwide employee organization with a current membership of 2.2 million members, the vast majority of whom are employed by public education institutions. NEA opposes legislation requiring public employees to speak English only while on the job because it disregards cultural pluralism and deprives those in need of education, social services, and employment.

People for the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs before this Court in litigation seeking to defend First Amendment rights. People For has joined in filing this brief to help vindicate the important First Amendment principles and values at stake in this case, particularly the right of the public to receive important information and to petition the government for redress of grievances, and the underlying, fundamental values of tolerance, pluralism, and participatory democracy.